DOCUMENT RESUME

ED 186 967 CS 502 931

AUTHOR Higdon, Philip R.
TITLE The Burger Court and the Press.
INSTITUTION Freedom of Information Center, Columbia, Mo.
REPORT NO FOI-0020
PUB DATE May 79
NOTE 8p.

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Court Doctrine; *Court Litigation; *Federal Courts; *Freedom of Speech; Journalism; *News Media
IDENTIFIERS *Supreme Court

ABSTRACT

This report discusses recent cases involving freedom of the press that have been heard before the Burger court of the United States Supreme Court. The report discerns a trend toward treating the press like an ordinary citizen; this is a reversal of the view of the Warren court that the First Amendment creates special rights for the press so that it may perform a watchdog function on the three branches of government. Also noted is a trend toward curtailing the rights and privileges of citizens in general. Among the cases reviewed are "First National Bank of Boston v. Bellotti," "Zurcher v. Stanford Daily," and "Houchins v. KQED." Cases the court refused to hear and thus let stand are cited, and a partial press victory, "Landmark Communications, Inc. v. Virginia," is noted. (DF)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED186967

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

SCHOOL OF JOURNALISM, UNIVERSITY OF MISSOURI AT COLUMBIA
MAY, 1979

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
Freedom of Information Center
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

FREEDOM OF INFORMATION CENTER REPORT NO. 0020

THE BURGER COURT AND THE PRESS

This report, published as part of the Freedom of Information Center's series of "opinion" papers, is based on a speech given by Philip R. Higdon, an attorney in Phoenix, at the Arizona Newspapers Association's convention in January.

Introduction

In 1971, Palo Alto, Calif., police — armed with a search warrant — conducted a surprise search of the offices of the Stanford **Daily**, the student-run newspaper at Stanford University. The police were looking for photographs of a crime committed during a demonstration several days before. The newspaper sued the police for violating its civil rights, because in its view the Fourth Amendment of the Constitution forbids issuing search warrants against people not suspected of a crime. The newspaper also argued that the First Amendment prohibits a search warrant against a newspaper not suspected of committing a crime. The newspaper lost.[1]

In another case coming from California, television and radio stations requested permission from a county sheriff to inspect and take pictures within a county jail facility. When permission was refused, the stations brought suit, contending that the sheriff had violated the First Amendment by refusing to permit media access to the facility. The stations lost.[2]

In New Mexico, four deputy sheriffs sued a radio station for defamation in a news broadcast. Some of the statements contained in the broadcast were based solely upon information from confidential sources. The deputy sheriffs demanded a court order requiring the station to divulge the names of the confidential sources so that they could cross-examine them. The radio station argued that it was privileged under the First Amendment not to reveal confidential information about its news sources. The radio station lost.[3]

In Iowa, a husband filed a defamation and invasion of privacy suit against the lawyer who represented his common-law wife in divorce proceedings. The suit was based on articles about the divorce appearing in a Des Moines newspaper. The reporter who wrote the stories refused to answer questions during her pretrial testimony in the case about the sources for her stories. She argued that the First Amendment gave her the right to refuse to answer questions about the identity of her sources, conversations with her sources, preparation of the articles and procedures followed in editing them. The reporter lost.[4]

In South Carolina, a trial judge issued a "gag" order in a criminal trial of a former state senator prohibiting all persons involved in the trial from "mingling with or being in the proximity of" the press in the courthouse, sealing the names of all jurors, prohibiting sketch artists from sketching jurors during the trial, and barring all comments to the press by the defendant, prosecutors, defense lawyers and others that "might divulge prejudicial matter not of public record." Several media organizations challenged the order as a violation of First Amendment rights to cover court proceedings. The media lost.[5]

By now you may have perceived a trend in the results of these recent cases involving the freedom of the press that have recently reached the Supreme Court. In case you haven't, let's try one more.

In New Jersey, a newspaper reporter was sent to jail for refusing to turn over his files on an investigation of the deaths of 13 hospital patients. His series of stories on the deaths ultimately led to the indictment of a doctor at the hospital on murder charges. The reporter and his newspaper — which was fined $5,000 a day until the files were turned over — argued on appeal that the First Amendment permitted them to refuse to relinquish the notes. As I am sure you all know by now, the reporter and his newspaper lost.[6]

These and other cases that the Supreme Court either decided or refused to hear during its last term set off a predictable outcry of alarm in newsrooms across the nation. Gene Roberts, executive editor of the Philadelphia **Inquirer**, called the recent trend of decisions "a dangerous pattern" that has already "had considerable impact."[7] Jonathan Kwitny, writing in the **Wall Street Journal**, flatly declared that the judiciary "has for all practical purposes declared war against the press."[8] Lyle Denniston, a reporter for the Washington **Star**, put it this way in an article in **Quill**:

> Taken at its worst, the last term of the Supreme Court will probably mean continuing misery for the press. The rights the press thought or assumed it had under the First Amendment fared badly. . . .
>
> Taken at its best, the Court's term may mean only that the press knows its friends on the Court better and can begin to recognize its adversaries. Within press ranks, that is not enough to overcome the feeling that the results were nearly a disaster.[9]

Others, of course, view the matter entirely differently. Many constitutional scholars, who are not engaged in a daily

Summary: The author of this report sees a trend toward restricting First Amendment rights and privileges in the results of cases involving the freedom of the press that have recently reached the Supreme Court.

or weekly struggle to get and print the news, feel that the Supreme Court remains sensitive to efforts to curtail the press's performance, but at the same time it does not see the press as enjoying any special access. Philip Kurland, a noted constitutional law expert at the University of Chicago, says that these recent cases show only that "the Court is not prepared to award the press special privileges which are not available to other citizens." "That's the whole shebang," Kurland says. "I don't think the press's freedom has been restrained, I think its privileges have been thwarted."[10]

There is no question that Professor Kurland is right in his characterization of how the Supreme Court viewed the issues presented in each of the cases I have described. In each case the press asserted a right — based on the First Amendment — that could not have been claimed by an ordinary citizen. And in each case, the Supreme Court held — or permitted a lower court to hold — that the First Amendment created no special rights for the media and that the press is to be treated like any other citizen in determining what its rights are. In my view, in so deciding, the Burger Court has wrongly reversed the view of the Warren Court that the First Amendment creates special rights for the press so that it may perform the watchdog function envisioned by the framers of the Constitution and act as an institution outside the government as an additional check on the three branches inside. I further submit that the Burger Court has done even more serious damage than that, because in its haste to reject claims by the press of special rights and privileges, it has run roughshod over the constitutional rights of all citizens.

I think Justice Stewart, in a 1974 address at the Yale Law School, well summarized the scope of the First Amendment's protection of the press. He said:

> So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can.
>
> But this autonomy cuts both ways. The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.
>
> The Constitution, in other words, establishes the contest, not its resolution.[11]

What I propose to do is briefly review the recent decisions of the Burger Court restricting the press's First Amendment rights and privileges, speculate on what rights remain under the freedom of the press clause, and contemplate, somewhat nervously, what may lie ahead.

Review of the Cases

A. First National Bank of Boston v. Bellotti

Before any of the cases directly involving the press were decided by the Supreme Court during the last term, Chief Justice Burger got off the first shot in the "war against the press" in a concurring opinion in a case called **First National Bank of Boston v. Bellotti.**[12] The case involved a suit by various banks and corporations challenging the constitutionality of a Massachusetts statute making it a crime for business corporations to make certain political contributions or expenditures. The Supreme Court held that the statute was an unconstitutional infringement on free speech and the Chief Justice concurred but filed a separate opinion that took several gratuitous swipes at what he called the "institutional press" that appeared to be uncalled for by the issues presented in the case. The Chief Justice made clear his view that the freedom of the press clause does not confer upon the institutional press any freedom from government restraint not enjoyed by all others.[13] The framers of the Constitution, he said, "did not intend to limit the freedom of the press to one select group."[14] Instead, freedom of the press comprehends "every sort of vehicle of information and opinion" and "is not confined to newspapers and periodicals."[15] The troublesome aspects of the Chief Justice's remarks aside, many were disturbed that he chose to make them at all in a context that did not require such a discussion. Why was the Chief Justice seemingly preoccupied with the issue? The answer would come quickly, when the Supreme Court announced its decision in the Stanford **Daily** case.

B. Zurcher v. Stanford Daily

On April 8, 1971 demonstrators occupied the administrative offices of the Stanford University Hospital. The next day police were called in to remove them. Demonstrators armed with sticks and clubs attacked a group of nine policemen, breaking one policeman's shoulder and injuring the other eight. The Stanford **Daily**, the student-run campus newspaper, published a special edition on the incident, including photographs. The district attorney's office then went to court and got a warrant to search the **Daily**'s offices for any prints or negatives that might help identify those who assaulted the police. Officers searched through filing cabinets, desks and wastebaskets but found no pictures except those already published in the **Daily**.

The **Daily** challenged the constitutionality of the search by suing the policemen, the district attorney and others for violating its federal civil rights. The newspaper claimed violations of its rights under the Fourth Amendment, limiting searches and seizures, and under the First, assuring the freedom of the press.[16]

Although the newspaper won in both the trial court and the court of appeals, the Supreme Court reversed and held against the newspaper on both the First and the Fourth Amendment arguments.

The Fourth Amendment declares inviolate "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and says that search warrants shall issue only "upon probable cause." The Stanford **Daily**'s position in court on the Fourth Amendment was that it should be possible to make an unannounced search for criminal evidence at the premises of a party not itself suspected of a crime only if the person might otherwise destroy the evidence. The newspaper argued that since there was no probable cause to believe that the **Daily** or its staffers were implicated in the assault on the police, the officials who wanted the photographs should have proceeded by a subpoena, which, unlike a search warrant, would have given the **Daily** prior notice and an opportunity to be heard first. The Supreme Court rejected this argument as "remarkable" and said that it amounted to a "sweeping revision of the Fourth Amendment," because the amendment made no distinction between criminal suspects and

others as possessors of material sought for purposes of law enforcement.[17]

On the First Amendment issue, the newspaper argued that the official intrusion into a newsroom without notice or a chance to object was an extremely grave violation of the First Amendment. It contended that the whole editorial process might be "chilled" by the fear that the process might be someday scrutinized by the state. And searches might disclose confidential sources as well. The majority of the Supreme Court found these claims to be unconvincing. The Court said that because the framers of the Constitution did not make any special provision for the press when they drafted the Fourth Amendment, they must have thought that the general rules of reasonableness and probable cause were enough to protect the press. The majority was not persuaded that press sources would dry up. Finally, they found no reason to believe that in passing on warrants magistrates — who in the majority of instances issue warrants — could not guard against unduly intrusive searches of newspapers.

Not every justice was unpersuaded by the newspaper's First Amendment arguments, however. Justices Stewart, Marshall and Stevens dissented. Justice Stewart, in a strong dissenting opinion, captured, I think, what perhaps most of us are probably thinking:

> It seems to me self-evident that police searches of newspaper offices burden the freedom of the press . . . . Policemen occupying a newsroom and searching it thoroughly for what may be an extended period of time will inevitably interrupt its normal operations, and thus impair or even temporarily prevent the processes of newsgathering, writing, editing, and publishing. . . .
>
> But there is another and more serious burden on a free press imposed by an unannounced police search of a newspaper office: the possibility of disclosure of information received from confidential sources, or of the identity of the sources themselves. Protection of those sources is necessary to insure that the press can fulfill its constitutionally designated function of informing the public, because important information can often be obtained only by an assurance that the source will not be revealed. . . .
>
> . . . And it cannot be denied that confidential information may be exposed to the eyes of police officers who execute a search warrant by rummaging through the files, cabinets, desks and wastebaskets of the newsroom. . . . A search warrant allows police officers to ransack the files of a newspaper, reading each and every document until they have found the one named in the warrant . . . . A search, unlike a subpoena, will therefore lead to the needless exposure of confidential information completely unrelated to the purpose of the investigation. The knowledge that police officers can make an unannounced raid on a newsroom is thus bound to have a deterrent effect on the availability of confidential news sources. The end result, wholly inimical to the First Amendment, will be a diminishing flow of potentially important information to the public.

The reaction of the media to the Stanford **Daily** decision was, predictably, swift and outraged. Benjamin Bradlee of the Washington **Post** called it "just plain awful." Allen Neuharth, president of the American Newspaper Publishers Association and of Gannett newspapers, said that the decision put "a sledgehammer in the hands of those who would batter the American people's First Amendment rights . . . . It literally and legally picks the lock that protects the exercise of free speech." Walter Cronkite of CBS News predicted the potential results of the decision: "[A] warrant," he said, "is signed by a judge, who [frequently] owes his election to the [local] political machine . . . . [S]ources dry up, scandal dies, and the political machine is free . . . ." Perhaps the most eloquent reaction came from Howard K. Smith of ABC News, who said:

> When I was a new young reporter at the United Press in Nazi Berlin . . . there was a knock at the door . . . and 15 Gestapo men barged past me, began opening every desk and studying every piece of paper they could find . . . . Six hours later they left . . . . I remember thanking God this couldn't happen in America. Well, now it can.[18]

Others, like Anthony Lewis, a lecturer on law at Harvard Law School and a columnist for the New York **Times**, were as alarmed by the press's reaction as by the decision itself. Lewis was unpersuaded by the Stanford **Daily**'s argument that the First Amendment gave the press special protection against search warrants and chastised the media for being narrow-minded in their reactions to the Supreme Court's decision. The real danger in the Stanford case, he said, "lay in the magnitude of the search and its intrusive quality. Police rummaged through files and rooms of the college paper, seeking photographs . . . . Such a search may do real harm not only to newspapers but to other 'third parties' — persons who are not themselves suspected of any crime but are thought to have evidence." Doctors, lawyers and others, Lewis pointed out, may fear unreasonably intrusive police searches through their files.[19]

It did not take the lower courts long to apply the Stanford **Daily** decision in other contexts. On Aug. 11, 1978, the United States Court of Appeals for the District of Columbia held that the federal government could subpoena telephone company records of a journalist's long-distance telephone calls and review those records, without providing any prior notice to the journalist. The court held that government access to third-party evidence in the course of a good-faith felony investigation in no sense abridges newsgathering, and the only burden it places on journalists is what it called "mere inconvenience."[20]

A number of legislators, at both the state and federal level, have introduced legislation designed to overturn the Stanford **Daily** decision. Some of the proposed legislation would protect only the press from third-party search warrants where the subject of the search warrant is not itself suspected of a crime and there is no probable cause to believe that evidence would be destroyed if a search warrant is not issued. Other proposed legislation takes the view expressed by Lewis and would prohibit the issuance of a search warrant against anyone — not just the press — not suspected of having committed a crime.

Interestingly, the first state to enact protective legislation after the Stanford **Daily** decision was California. On Sept. 23, 1978, Governor Jerry Brown signed a bill that included an amendment extending the state's shield law to prohibit searches of newsrooms. That enactment applies strictly to media and media personnel.[21]

As you probably know, the Carter administration proposed in December a new law to protect reporters, scholars and

their sources from searches by federal, state and local law enforcement officers. Under the administration's proposal, law enforcement officers would be prohibited from searching the notes, photographs and other "work products" of reporters, scholars and others who disseminate information to the public. The only exceptions would arise where a search was deemed necessary to prevent serious injury to an individual, or where the person possessing protected material was believed to have committed a crime for which the material would be evidence. The proposal would extend protection to those who have gathered information with the intention of making it available for publication or broadcast.[22]

The Arizona Newspapers Association has drafted legislation designed to overturn the Stanford Daily decision here at the state level. The current draft of the ANA proposal would extend protection to all third parties not suspected of a crime. The association is making arrangements for having the bill introduced, but frankly I am not optimistic about its chances for passage this session.

C. Houchins v. KQED

A second U.S. Supreme Court decision of the last term also has a potentially wide-ranging effect on the media, but in a very different context.

On March 31, 1975, radio and television stations KQED of San Francisco reported the suicide of a prisoner in the Santa Rita Jail in Alameda County, Calif. The report included a statement by a psychiatrist that the conditions at the facility were responsible for the illnesses of his patient-prisoners there, and a statement from the Alameda County Sheriff, Thomas Houchins, denying that prison conditions were responsible for the prisoners' illnesses. KQED requested permission to inspect and take pictures within the facility but was refused. As a result, KQED filed suit under the federal Civil Rights Act, claiming that its First Amendment rights had been violated by the sheriff's refusal to permit media access and failure to provide any effective means by which the public could be informed of conditions at the jail or learn of the prisoners' grievances. Shortly after the complaint was filed, the sheriff announced a new program and invited all interested persons to make arrangements for attending regular monthly tours of the facility. The tours, however, were limited to 25 persons each on a first-come first-served basis and did not include some of the most controversial areas of the jail. Photographs of some parts of the jail were made available, but no cameras or tape recorders were allowed on the tours. Those on the tours were not permitted to interview inmates, and inmates were generally removed from view. Journalists being what they are, KQED was still not satisfied and pressed the suit.

The trial court accepted KQED's position and granted a preliminary injunction prohibiting the sheriff from denying KQED news personnel and "responsible representatives" of the news media access to the jail facilities at "reasonable times and hours." The sheriff was also prohibited from preventing newsmen from taking pictures or using tape recorders or interviewing inmates "in providing full and accurate coverage of the . . . facilities." In issuing its order, the trial court rejected the sheriff's contention that the tour policy then in effect was necessary to protect inmate privacy or minimize security and administrative problems. The U.S. Court of Appeals affirmed the trial court's position.[23]

The issues presented to the U.S. Supreme Court in the case related almost entirely to the question of whether the First Amendment does, in fact, create a "people's right to know" — especially about matters of interest to them as citizens and voters. Alas, the Supreme Court flatly rejected the idea that there is a constitutional right to know about governmental action and policy.

Speaking for the majority, Chief Justice Burger narrowed the rights of the press:

> The public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions with camera equipment, and take . . . pictures of inmates for broadcast purposes. This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.[24]

The public's general right of access fared no better when Chief Justice Burger said:

> There is no discernable basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would, under [KQED's] approach, be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems "desirable" or "expedient." We, therefore, reject [KQED's] conclusory assertion that the public and the media have a First Amendment right to government information regarding the conditions of jails and their inmates and presumably all other public facilities such as hospitals and mental institutions.[25]

The majority opinion went on to list several ways that KQED could learn about conditions at the jail that the sheriff could not prevent, such as receiving letters from inmates and interviewing inmates' lawyers.[26]

Again, while the KQED decision has been widely understood as saying the press has no greater access to government information than any other member of the public, an equally significant — and disturbing — conclusion by the court was that no one — public or press — has any right to such information.[27] Chief Justice Burger said it: "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."[28]

But Chief Justice Burger did not stop there. Not content with blasting the concept of a constitutional right to know, the majority opinion in the KQED case also appeared to begin the process of diminishing the "right to gather news." That right had existed, in somewhat fragile form, since the court's 1972 ruling on grand jury access to a reporter's notes. There, the Court suggested that "news gathering is not without its First Amendment protection" and that "without some protection for seeking out the news, freedom of the press could be eviscerated."[29] But in his KQED decision, Chief Justice Burger dismissed those thoughts as mere "dictum"; that is, without binding effect. He then declared that: "there is an undoubted right to gather news from any source by means within the law . . . but that forms no basis for the claim that the First Amendment compels others — private persons or governments — to supply information." "The First Amendment," he added, "is [not] a Freedom of Information Act."[30]

I should emphasize that the KQED decision does not require limitations on media access to public facilities, it only permits such limitations if public officials are so inclined. Jonathan Marshall here in Arizona negotiated long and hard last summer with state prison officials and was able to obtain fairly liberal access regulations here, notwithstanding the KQED result. But the KQED decision makes it clear that prison officials and other public employees may feel free to restrict media and public access in the future, at least where they can make a colorable argument that such restrictions are useful in furthering some state interest.

D. Cases the U.S. Supreme Court Refused to Hear

The other cases mentioned at the beginning of this report were not actually decided by the U.S. Supreme Court but were decided by lower courts and the U.S. Supreme Court refused to hear them, although it was requested to do so. The Court may decide to consider similar cases in the future and may change the result, but for right now, those decisions remain good law in the jurisdictions where they came from and are of at least precedential value elsewhere. Let me just briefly recapitulate what those cases were about.

1. In the case involving Myron Farber, the New York **Times** reporter who wrote a series of stories about the deaths of 13 hospital patients that ultimately led to the indictment of a doctor for murder, the doctor's attorney subpoenaed Farber's files in the case to determine if they contained anything that might help him in defense of the criminal action. Farber refused to turn over his files and the **Times** joined in that refusal, even after the trial court ordered them to produce the files. Farber was sent to jail by the trial court and the **Times** was fined $5,000 per day until they changed their minds. Farber was in and out of jail while various appeals were prosecuted. The New Jersey Supreme Court sided with the trial court and held that a reporter's First Amendment rights — even though protected by a state shield law — must give way to a criminal defendant's right to a fair trial. The U.S. Supreme Court made no comment in refusing to hear the case and letting the New Jersey decision stand.[31] Incidentally, even without Farber's notes, the doctor was acquitted and Farber was finally released after spending 40 days in jail.[32] The **Times**, meanwhile, had paid over $200,000 in legal fees and fines.[33]

2. In the New Mexico case, a radio station reported in a news broadcast that a deputy sheriff had served a penitentiary sentence, that another had attempted to smuggle an alien from Mexico to become the sheriff's housekeeper and that two others had used county-owned cars to go to a racetrack. After the four deputies sued the station for malicious defamation, the New Mexico Court of Appeals ordered the station and its reporters to disclose the sources of their information, to determine whether the sources were reliable and the information accurate. Both the New Mexico Supreme Court and the U.S. Supreme Court refused to hear the case, so that the order was permitted to stand.[34]

3. In a similar case in Idaho, a former undercover agent for the State Bureau of Narcotic Enforcement brought a libel action against a newspaper publisher and a newsman with respect to a newspaper article in which the newsman attributed certain statements about the plaintiff to an undisclosed "police expert." The trial court found the newsman in contempt for refusing to disclose the identity of the police expert and the Idaho Supreme Court agreed, finding that neither the First Amendment nor the Idaho Constitution afforded the newsman a privilege against the disclosure of news sources in the context of a libel suit against the newspaper. The U.S. Supreme Court let the decision stand by refusing to hear the case.[35]

4. In Iowa, a woman commenced proceedings to dissolve a common-law marriage that she claimed had existed between her and a man named Winegard. While these proceedings were going on, a reporter for a Des Moines newspaper wrote two articles about the case that appeared in the paper. Many of the statements in the articles were attributed to the woman's lawyer. On the basis of those articles, Winegard sued the lawyer for defamation and invasion of privacy. In that suit, Winegard sought to depose the reporter and obtain from her any information obtained from the lawyer and notes made in preparation of the articles. The reporter refused to give this information at her deposition, and the trial court supported her position. The Iowa Supreme Court, however, reversed the trial court, holding that there existed an undiluted compelling state interest of such persuasive force as to subordinate a news reporter's privilege to withhold the confidentiality of her sources and information and to require the reporter to submit the information to Winegard. This was held to be true, at least, where the information was necessary or critical to the case, where other reasonable means available to obtain the information were exhausted and where it did not appear from the record that the case was patently frivolous. The U.S. Supreme Court refused to hear the case, and the Iowa Supreme Court's decision stands.[36]

5. Finally, there are two so-called "gag order" cases that should be mentioned. In 1976 the Supreme Court held that judicial orders restricting what the press may publish about pending criminal proceedings are, generally speaking, offensive to the First Amendment. Such orders, the Court said, operate as a prior restraint on the publication of lawfully obtained information and thus represent the least tolerable form of interference with protected expression.[37]

The Supreme Court during the last term had the chance to review two rulings about orders that did not restrict what could be published but did restrict access to information. The Ohio Supreme Court had let stand a trial court's order prohibiting a criminal defendant, his attorneys, the prosecutor, the prosecutor's staff and all witnesses from making any statements outside the courtroom about a criminal trial during the trial.[38] The U.S. Court of Appeals had upheld a South Carolina trial court's order prohibiting all persons involved in a criminal trial from "mingling with or being in the proximity of" the press in the courthouse and barring all comments to the press by the defendant, his attorneys, the prosecutors and others "that might divulge prejudicial matter not of public record."[39] The U.S. Supreme Court refused to review either case, thereby letting the lower court decisions stand. What the gag order rule appears to be now is that gag orders may not be directed at the press itself and may not prohibit the press from publishing what it has learned, but they may be directed against others to prevent the press from obtaining information.

E. Landmark Communications, Inc. v. Virginia

The press did score one partial victory in the last term of the Supreme Court. The Virginia Judicial Inquiry and Review Commission was created in 1971 to investigate charges of judicial misconduct. The state Legislature later passed a law making it a criminal misdemeanor for "any person . . . to divulge information" about the commission's proceedings. In November 1975, the Norfolk **Virginian-Pilot**

published a story identifying a local judge under scrutiny by the commission. As a result, the publisher of the **Pilot** was convicted of violating the confidentiality statute. The publisher appealed the conviction to the U.S. Supreme Court after the Virginia Supreme Court sustained the conviction. The publisher argued that Virginia could not constitutionally make it a crime to publish truthful statements about a public official's public duties. In a unanimous decision, the U.S. Supreme Court held that the conviction of the publisher and the confidentiality statute were unconstitutional.[40] **But** the Court rejected the publisher's argument that no criminal penalties can ever be imposed for truthful reporting about the actions of government agencies. The Court also ruled that the existence of unconstitutional criminal penalties for publication of news does not operate as a "prior restraint" on First Amendment rights to publish,[41] whatever that means. Chief Justice Burger wrote the opinion.

What Lies Ahead

Many journalists — and their lawyers — breathed a sigh of relief when Myron Farber's appeal to the U.S. Supreme Court was rejected and the Court refused to render a decision in the matter. These people were relieved not because they were happy to see the New Jersey contempt order stand but because they were spared another bombshell Supreme Court opinion further eroding the rights of the press that would be binding all across the country rather than just in New Jersey. This feeling reflects the understandable uneasiness among journalists about their perception of the Burger Court's attitude on the First Amendment The Court has agreed to hear two cases during this term, however, that could result in strengthening this mournful perception. One case involves a "60 Minutes" segment aired on CBS in 1973 and an **Atlantic Monthly** article written by CBS producer Barry Lando, both of which cast serious doubts on charges made by former Lt. Col. Anthony Herbert in his book, in which he claimed that he had told his Army superiors of Vietnam War crimes in 1969 and that the superiors had covered up the accusations. Herbert, in a defamation suit against CBS and **Atlantic Monthly**, charged that the program and the articles maliciously portrayed him as a liar, as one who had committed war crimes himself and as an opportunist. During proceedings prior to trial, Lando refused to answer questions about his thoughts, judgments and newsroom discussions held during the preparation of the stories. Specifically, Lando refused to discuss his conclusions about what news leads to follow, his beliefs about the credibility of the people he interviewed, conversations with his colleagues about what to include in the broadcast, and what his intentions were in deciding what to include and what to leave out.[42]

The United States Court of Appeals ruled in Lando's favor and held that the First Amendment grants a journalist an absolute privilege from being forced, in a libel suit, to disclose his thought processes prior to publishing a story.[43] The Supreme Court heard arguments on the case last fall, but has yet to render its opinion.* The case is of critical importance, because for the first time newsmen have been asked to reveal not just sources or information but what went on in their heads in the preparation of a story.

In another case already argued, the Supreme Court has been asked to rule on the constitutionality of a trial court order essentially excluding the press from covering criminal pretrial proceedings.[44]

In addition to legislative efforts to overturn the Stanford **Daily** decision, the National Conference of Commissioners on Uniform State Laws has drafted a Uniform Reporter's Privilege Act.[45] The announced purpose of the uniform act is to remove the current hodgepodge of the state shield laws and replace it with a uniform law so that reporters' rights will not tremendously vary from state to state. A recent article on the proposal predicted that "by offering the legislation as a uniform law, proponents could count on a fairly good reception from state lawmakers."[46] (With Arizona in mind, I put my pen to the margin of the article and wrote, "Ha!")

In sum, my report on the First Amendment and the Burger Court is not a very happy one, I'm afraid, and I fear that conditions may only get worse. The Court has not only clearly rejected the idea that the press enjoys special privileges and rights over and above those of other citizens, it has at the same time cut back on the privileges and rights of all citizens. By way of advice, I can only echo the words of columnist Carl Rowan: "[T]he press," he said, "must go on doing its job, committing notes and sources to memory, burying papers in tin cans and empty whiskey bottles." Perhaps it will be a long time, he said, before "we will get another Supreme Court competent to understand why this nation's founders adopted the First Amendment."[47]

---

* **Editor's Note:** In April 1979 the Supreme Court reversed the appeals court ruling and held by a 6-3 vote that public figures suing for libel may ask questions about a journalist's "state of mind" while he was preparing material and the reasons behind his editorial judgments.

FOOTNOTES

1. **Zurcher v. Stanford Daily**, 98 Sup. Ct. 1970 (1978).
2. **Houchins v. KQED, Inc.**, 98 Sup. Ct. 2588, 46 LW 4830, 4830-31 (1978).
3. **Ammerman v. Hubbard Broadcasting, Inc.**, 91 N. M. 250, 572 P.2d 1258 (Ct. App.), **cert. denied**, 91 N.M. 249, 572 P.2d 1257 (1977), **cert. denied**, 98 Sup. Ct. 2237 (1978).
4. **Winegard v. Oxberger**, 258 N.W. 2d 847 (Iowa 1977), **cert. denied**, 98 Sup. Ct. 2234 (1978).
5. **Central South Carolina Chapter, Society of Professional Journalists v. Martin**, 556 F.2d 706 (4th Cir. 1977), **cert. denied**, 98 Sup. Ct. 749 (1978).
6. **In re Farber**, 78 N.J. 259, 394 A.2d 330, **cert. denied**, 47 LW 3369 (1978).
7. David M. Alpern and Diane Camper, "The Court and the Press," **Newsweek**, 26 June 1978, p. 93.
8. Jonathan Kwitny, "A Judicial War on the Press?" **Wall Street Journal**, 23 August 1978, p. 12.
9. Lyle Denniston, "Without a Champion," **Quill**, September 1978, p. 23.
10. "Commotion from the High Court?" **Quill**, July-August 1978, p. 6.
11. Stewart, " 'Or of the Press,' " 26 Hastings L.J. 631, 636 (January 1975).
12. **First National Bank of Boston v. Bellotti**, 98 Sup. Ct. 1407 (1978).
13. 98 Sup. Ct. at 1427-29 (Burger concurring opinion).
14. 98 Sup. Ct. at 1428.
15. 98 Sup. Ct. at 1429, quoting **Branzburg v. Hayes**, 408 U.S. 665, 704-5, 92 Sup. Ct. 2646, 2668 (1972), quoting **Lovell v. Griffin**, 303 U.S. 444, 452, 58 Sup. Ct. 666, 669 (1938).
16. Lewis, Comment, 30 Harv. L. Sch. Bull. No. 1, 5 (Fall 1978).
17. **Zurcher v. Stanford Daily**, 98 Sup. Ct. 1970 (1978).
18. "Leading Media Figures Attack Police Raid Ruling," **News Media & The Law**, July 1978, p. 4.
19. Halina J. Czerniejewski, "The Specter From Stanford: Your Newsroom May Be Searched," **Quill**, July-August 1978, pp. 24-25; see also Lewis, pp. 7-8.
20. **Reporters Committee for Freedom of Press v. AT&T**, 47 LW 2109 (D.C. Cir. 11 August 1978).
21. "Media Law: Shield Laws," 47 LW 2228 (1978).
22. "Carter Proposes Law to Shield Reporters, Others From Search," **Wall Street Journal**, 14 December 1978, p. 6.
23. **Houchins v. KQED, Inc.**, 98 Sup. Ct. 2588, 46 LW 4830, 4830-31 (1978).
24. 46 LW at 4832.
25. 46 LW at 4833.
26. **Ibid.**
27. Denniston, p. 23.
28. **Houchins v. KQED, Inc.**, 46 LW at 4833.

29. **Branzburg v. Hayes**, 408 U.S. 665, 681, 92 Sup. Ct. 2646, 2656 (1972).
30. **Houchins v. KQED, Inc.**, 46 LW at 4832, 4833.
31. **In re Farber**, 78 N.J. 259, 394 A.2d 330, **cert. denied**, 47 LW 3369 (1978).
32. "The High Court Chooses To Leave This One Alone," **Quill**, December 1978, p. 7.
33. "The Release of Farber," **Quill**, November 1978, p. 6.
34. **Ammerman v. Hubbard Broadcasting, Inc.**, 91 N.M. 250, 572 P.2d 1258 (Ct. App.), **cert. denied**, 91 N.M. 249, 572 P.2d 1257 (1977), **cert. denied**, 98 Sup. Ct. 2237 (1978).
35. **Caldero v. Tribune Publishing Co.**, 98 Idaho 288, 562 P.2d 791, **cert. denied**, 434 U.S. 930, 98 Sup. Ct. 418 (1977).
36. **Winegard v. Oxberger**, 258 N.W. 2d 847 (Iowa 1977), **cert. denied**, 98 Sup. Ct. 2234 (1978).
37. **Nebraska Press Association v. Stuart**, 427 U.S. 539, 96 Sup. Ct. 2791 (1976).
38. **Ohio ex rel. Leach v. Sawicki**, No. 77-368 (Ohio 3 June 1977), **cert. denied**, 98 Sup. Ct. 729 (1978).
39. **Central South Carolina Chapter, Society of Professional Journalists v. Martin**, 556 F.2d 706 (4th Cir. 1977), **cert. denied**, 98 Sup. Ct. 749 (1978).
40. "Judicial Secrets Act Voided," **News Media & The Law**, July 1978, p. 24.
41. **Landmark Communications, Inc. v. Virginia**, 98 Sup. Ct. 1535, 46 LW 4389 (1978).
42. "Federal Appeals Court Protects Newsman's Thoughts," **News Media & The Law**, December 1977, p. 36.
43. **Herbert v. Lando**, 568 F.2d 974 (2d Cir. 1977).
44. **Gannett Company v. DePasquale**, 55 App. Div. 2d 107, 389 N.Y. S. 2d 719 (4th Dep't 1976), **modified**, 43 N.Y. 2d 370, 401 N.Y.S.2d 756, 372 N.E.2d 544 (1977), **cert. granted**, 98 Sup. Ct. 1875 (1978); see also "Press Hoping for Improved Court Record," **Publishers' Auxiliary**, 13 November 1978, p. 1.
45. National Conference of Commissioners on Uniform State Laws, Uniform Reporter's Privilege Act (2d Tent. Draft 1975).
46. Wilburn, "Uniform Shield Laws Called Best Hope for Ending Press-Court Fights," **Arizona Republic**, 19 November 1978, p. A-30.
47. Quoted in Halina J. Czerniejewski, "The Specter From Stanford: Your Newsroom May Be Searched," **Quill**, July-August 1978, p. 25.